November 2003

MJI Publication Updates

Adoption Proceedings Benchbook

Criminal Procedure Monograph 2—Issuance of Search Warrants (Revised Edition)

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November 2003

Update: Adoption Proceedings Benchbook

CHAPTER 3

Identifying the Father

3.2 Due Process and Equal Protection for Fathers

Insert the following case summary on page 82, after the second paragraph:

- ***Aichele v Hodge*, ___ Mich App ___ (2003)**

In *Aichele*, Sandra Hodge, the mother, was married when she conceived and gave birth to Katherine Hodge, a child who was not an issue of the marriage. In March 1998, two months after the child's birth, the mother and putative father, George A. Aichele, underwent paternity testing. The results showed that there was a 99.99 percent chance that Aichele was the child's biological father. The mother and Aichele then signed an affidavit of parentage and named Aichele as the child's father on her birth certificate. Four years later, the mother told Aichele that he could no longer have contact with Katherine. Aichele then filed a petition for custody, parenting time, and child support alleging that he and Sandra Hodge were Katherine's "parents." The mother filed a motion to dismiss for lack of standing asserting that Katherine is presumed to be an issue of the marriage because she was conceived and born in wedlock. Sandra Hodge's husband, Carey Hodge, filed a successful motion to intervene and alleged that he was Katherine's presumptive father. Carey Hodge indicated that he was unaware of the affidavit of parentage and the affidavit was invalid because the Acknowledgment of Parentage Act requires the child's mother to be unmarried. Aichele filed a motion for summary disposition indicating that he visited with the child and provided support for the child. The trial court denied Aichele's motion for summary disposition and found that the steps taken by Aichele to sign the acknowledgment and amend the birth certificate did not "in any way negate the parentage of [Carey] Hodge." ___ Mich App at ___. The trial court also ruled that the statutes Aichele relied upon in his motion for summary disposition were only applicable to children born out of wedlock. ___ Mich App at ___.

Aichele appealed the decision, arguing that he had a protected liberty interest in his established relationship with Katherine. Aichele relied on *Hauser v*

Reilly, 212 Mich App 184 (1995). The *Hauser* court found that a putative father who has an established relationship with his child has a protected liberty interest in that relationship under the *Michigan* Constitution, *Id*. at 188, relying upon *Michael H v Gerald D,* 491 US 110, 142–43 (Brennan J, dissenting) (1989). In *Aichele*, the Court of Appeals concluded that not only did the evidence of record not show a relationship between Aichele and the child, but that the statements in *Hauser* were dicta. *Aichele, supra* at ___, citing *McHone v Sosnowski*, 239 Mich App 674 (2000). The Court stated that "[t]here has yet to be any determination in this state that a putative father of a child born in wedlock without a court determination of paternity has a protected liberty interest with respect to a child he claims as his own."

CHAPTER 3
Identifying the Father

3.7 Acknowledgment of Parentage

B. Effect of Acknowledgment

Insert the following text on page 95, immediately before Section 3.7(C):

In *Aichele v Hodge*, ___ Mich App ___ (2003), the Michigan Court of Appeals determined that an acknowledgment of parentage is not valid when the child is not "born out of wedlock," even where the mother voluntarily signs an acknowledgment indicating that her husband is not the biological father. In *Aichele*, Sandra Hodge was married when she conceived and gave birth to Katherine Hodge, a child who was not an issue of the marriage. In March 1998, two months after the child's birth, the mother and putative father, George A. Aichele, underwent paternity testing. The results showed that there was a 99.99 percent chance that Aichele was the child's biological father. The mother and Aichele then signed an affidavit of parentage and named Aichele as the child's father on her birth certificate. Four years later, the mother told Aichele that he could no longer have contact with Katherine. Aichele then filed a petition for custody, parenting time, and child support alleging that he and Sandra Hodge were Katherine's "parents." The mother filed a motion to dismiss for lack of standing asserting that Katherine is presumed to be an issue of the marriage because she was conceived and born in wedlock. Sandra Hodge's husband, Carey Hodge, filed a successful motion to intervene and alleged that he was Katherine's presumptive father. Carey Hodge indicated that he was unaware of the affidavit of parentage and the affidavit was invalid because the Acknowledgment of Parentage Act requires the child's mother to be unmarried. Aichele filed a motion for summary disposition indicating that he visited with the child and provided support for the child. The trial court denied Aichele's motion for summary disposition and found that the steps taken by Aichele to sign the acknowledgment and amend the birth certificate did not "in any way negate the parentage of [Carey] Hodge." ___ Mich App at ___. The trial court also ruled that the statutes Aichele relied upon in his motion for summary disposition were only applicable to children born out of wedlock. ___ Mich App at ___.

Aichele appealed the trial court's decision and argued that the affidavit of parentage provides him with standing to seek custody and/or parenting time under the Child Custody Act. The Court of Appeals disagreed and held that in order for an affidavit of parentage to be properly executed the child must be "born out of wedlock." The Court of Appeals reviewed the definition of "child" contained in the Acknowledgment of Parentage Act and the definition of "child born out of wedlock" in the Paternity Act.* The Court found that under both the Paternity Act and the Acknowledgment of Parentage Act, paternity can only be established if the child is "born out of wedlock," i.e.,

*See Section 3.3 for a detailed comparison of the definitions of "child" and "child born out of wedlock."

either the child is born to a woman who is not married at the time of conception or birth or a court has already determined that the child was not an issue of the marriage. ___ Mich App at ___. In concluding that Aichele did not have standing, the Court stated:

> "In short, an affidavit of parentage can never be properly executed unless a child is born out of wedlock. Katherine was not born out of wedlock because she was conceived and born during [Sandra Hodge's] marriage to Hodge and there had been no judicial determination that she was not an issue of the marriage. Therefore, the affidavit of parentage signed by plaintiff and defendant was invalid. Because the affidavit of parentage was invalid, it does not provide plaintiff with standing to seek custody of Katherine." ___ Mich App at ___.

Cooper, PJ, dissenting, also compared the definitions of "child" and "child born out or wedlock" in the Paternity Act and the Acknowledgment of Parentage Act. The dissent indicated that the majority overlooked a significant difference between the two definitions:

> "Notably, the Acknowledgement [sic] of Parentage Act defines a child as an individual 'conceived and born to a woman who was not married at the time of conception or the date of birth of the child, or a child that the circuit court *determines* was born or conceived during a marriage but is not the issue of that marriage.' In this regard, I note that both *Girard*[*v Wagenmaker,* 437 Mich 231 (1991)*] and the Paternity Act existed well before the Legislature enacted the Acknowledgement [sic] of Parentage Act in 1996. So it can only be assumed that the Legislature was aware of the Supreme Court's analysis in *Girard* that the use of 'determine' in the past perfect tense would require a previous court determination that the child was not an issue of the marriage. Under the same rationale, the use of 'determine' in the present tense indicates a legislative intent to depart from the requirement of a past determination in the Acknowledgement [sic] of Parentage Act. . . . Accordingly, I conclude that the Legislature's use of the present tense in the phrase 'that the circuit court determines,' renders a prior determination of whether the child was an issue of the marriage unnecessary in the Acknowledgement [sic] of Parentage Act. This is only logical, given the fact that a putative father seeking standing under this act is armed with an acknowledgment of his paternity voluntarily signed by the mother." ___ Mich App at ___.

*See Section 3.8(B) for a case summary of *Girard v Wagenmaker*, 437 Mich 231 (1991).

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Identifying the Father

3.8 The Paternity Act

B. A Child That the "Court Has Determined to Be a Child Born or Conceived During a Marriage but Not the Issue of That Marriage"

Insert the following on the bottom of page 100, immediately after the October 2003 Update for *Kaiser v Schreiber*, ___ Mich App ___ (2003):

Note: In *Aichele v Hodge,* ___ Mich App ___ (2003), the Court of Appeals expressly criticized the Court of Appeals' holding in *Kaiser v Schreiber*, ___ Mich App ___ (2003). In *Aichele*, the Court of Appeals stated:

> "[T]o the extent *Kaiser* allows a defendant to essentially confer standing on a plaintiff by admitting his paternity, we note our strong disapproval of the majority opinion and agree with Judge Wilder's dissent. First, the holding completely disregards the presumption of legitimacy and its underlying purpose and circumvents established legal process. It permits the mother of a child born out of wedlock and the putative father to collude and essentially rob the presumed father of his parental rights and his child. This is particularly egregious as a married father would be stripped of his parental rights without notice or hearing." ___ Mich App at ___.

The Court further concluded that *Kaiser* "wrongly held that the mere lack of dispute of paternity between a plaintiff and defendant can overcome the well-established presumption of legitimacy." ___ Mich App at ___.

The dissent in *Aichele* disagreed with the majority's disapproval of the decision in *Kaiser*. The dissent noted that pursuant to MCR 7.215(I)(1), "[a] panel of this Court is required to follow a prior published opinion of this Court issued on or after November 1, 1990." ___ Mich App at ___.

CHAPTER 3

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3.10 Putative Father Hearing — Child Protective Proceedings

Insert the following on the bottom of page 120, before the last paragraph:

In *In re CAW,* 469 Mich 192 (2003), the Michigan Supreme Court reversed the Court of Appeals' decision that a putative father has standing to intervene in a child protective proceeding under the Juvenile Code where the child involved has a legal father. *In re CAW* involved a married couple, Deborah Weber and Robert Rivard, and their children. In July 1998, a petition alleging abuse and neglect was filed pursuant to MCL 712A.2(b). The petition stated that Rivard was the legal father of the children but might not be the biological father of "any or all of the children." The petition also indicated that Larry Heier was the biological father of one of Weber and Rivard's children, CAW. The trial court published a notice of hearing to Heier, but he did not attend any hearings. Later Rivard and Weber indicated that Rivard was the father of all of the children. The trial court then deleted all references to Heier contained in the petition. In November 2000, Weber and Rivard's parental rights to CAW were terminated. Heier then filed a motion in the trial court seeking to intervene in the child protective proceedings. Heier alleged that he was the biological father and had standing on that basis. The lower court denied Heier's motion. 469 Mich at 197. The Court of Appeals reversed.

*MCR 5.921 was amended on May 1, 2003. See MCR 3.921(C).

The Supreme Court held that Heier did not have standing to intervene in the child protective proceedings. *Id.* The Court indicated that intervention in such a proceeding is controlled by MCR 5.921(D),* which provided, in part, that a putative father is entitled to participate only "[i]f, at any time during the pendency of a proceeding, the court determines that the minor has no father as defined in MCR 5.903(A)(4). . . ." MCR 5.903(A)(4) defined a "father" as "a man married to the mother at any time from a minor's conception to the minor's birth unless the minor is determined to be a child born out of wedlock . . . ." MCR 5.903(A)(1) defined a "child born out of wedlock" as a child conceived and born to a woman who is unmarried from the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of the marriage. Because Weber and Rivard were married during the gestation period, CAW was not "born out of wedlock." No finding had ever been made that CAW was not the issue of the marriage, and the termination of Rivard's parental rights was not a determination that CAW was not the issue of the marriage. Therefore, the requirements of MCR 5.903 were not met, and Heier did not have standing. The Court also stated the following regarding the policy underlying the applicable rules:

> "Finally, in the Court of Appeals opinion, as well as the dissent, there is much angst about the perceived unfairness of not allowing Heier the opportunity to establish paternity. We are more comfortable with the law as currently written. There is much that benefits society and, in particular, the children of our state, by a legal regime that presumes the legitimacy of children born during a marriage. See *Serafin v Serafin*, 401 Mich 629, 636; 258 NW2d 461 (1977). It is likely that these values, rather than failure to consider the plight of putative fathers who wish to invade marriages to assert paternity claims, motivated the drafters of the rules and statutes under consideration." 469 Mich at 199-200.

Justice Weaver concurred with the result of the majority's opinion but provided different reasoning. Justice Weaver indicated that the definition of "child born out of wedlock" in MCR 5.903(A)(1) varied from the definition in the Paternity Act only in the additional provision in MCR 5.903(A)(1) that paternity could be determined "by judicial notice or otherwise." However, the additional provision does not affect when the determination that the child is not an issue of the marriage must be made in order to permit standing. Pursuant to *Girard v Wagenmaker,* 473 Mich 231, 242–43 (1991), in order to establish paternity under the Paternity Act of a child born while the mother was legally married to another man, there must be a prior court determination that the mother's husband is not the father. Justice Weaver stated the following:

> "The provision [in MCR 5.903] that the determination may be made by judicial notice does not affect when the determination must be made in order to permit standing. Moreover, the use of the past tense makes even clearer the fact that the determination must be made by the court *before* a putative father may be accorded standing in a child protective proceeding. Because Weber was married to Rivard from the time of conception to the birth of CAW, and because CAW was not 'determined by judicial notice or otherwise to have been conceived or born during a marriage but . . . not the issue of that marriage' pursuant to MCR 5.903(A)(1), the provisions for notice to a putative father in MCR 5.921(D) were not applicable." (Footnotes omitted.) 469 Mich at 203.

Justice Kelly wrote separately, concurring in part and dissenting in part. Justice Kelly agreed with the result reached by the majority but disagreed with the majority's reliance on MCR 5.921(D) and the policy underlying the Paternity Act. Justice Kelly indicated that MCR 5.921 does not explicitly address standing to intervene: it designates the persons who must be given notice before a child protective proceeding can go forward. MCR 5.901, which prescribes the court rules that apply to child protective proceedings, does not include a rule that permits intervention in a child protective proceeding. Therefore, Justice Kelly would hold that Mr. Heier could not identify a court rule under which he could intervene and, as a consequence, the trial court was required to deny his motion. 469 Mich at 208.

In regards to public policy, Justice Kelly stated the following:

> "I do not agree that the presumption of legitimacy rule has persuasive force in this case. Certainly, the majority would not advance the argument that this rule protects the sanctity of CAW's family unit. That proposition is absurd in the context of termination proceedings, the object of which is to *destroy* any familial bond between a child and the parent whose rights are being terminated.
>
> "Similarly, the policy cannot be advanced on the basis that it furthers the goals expressed in the juvenile code. Rigid application of the presumption of legitimacy would frustrate the code's preference for placing a child with his parent, if the parent is willing and able to care for him." 469 Mich at 206–07.

Justice Kelly urged that the court rules be amended to allow a putative father the right to intervene in a child protective proceeding if he is able to raise a legitimate question about paternity. 469 Mich at 208.

Dissenting, Justice Cavanagh argued that the Legislature intended to allow putative fathers an opportunity to intervene in child protective proceedings. Justice Cavanagh stated:

> "[N]othing in our statutes or court rules compels the conclusion that a putative father must first establish paternity in a separate legal proceeding. To so hold perpetuates the errors caused by the majority's position in *Girard*[*v Wagenmaker,* 437 Mich 231 (1991)], while denying parents the right to develop and maintain relationships with their children." 469 Mich at 209.

The dissent also indicated that the courts making paternity and custody determinations have the authority to inquire about a child's putative father or parent in fact in order to ensure the protection of a child's best interests and due process rights. *Id.*

In *In re CAW (On Remand)*, ___ Mich App ___, ___ (2003), the Supreme Court instructed the Court of Appeals to addressed Heier's argument that "the juvenile code, by precluding standing to intervene in a child protective proceeding, deprives him of a fundamental right without the benefit of procedural or substantive due process."

The Court of Appeals stated that *Girard v Wagenmaker*, 437 Mich 231 (1991), held that "a putative father lacks standing to challenge paternity if a prior determination on paternity regarding the mother's husband was not made." However, in *Hauser v Reilly*, 212 Mich App 184, 188–89 (1995), the Court of Appeals concluded that the state constitution affords a putative father a due process interest in proceedings related to paternity if the putative father has an established relationship with the child. *Hauser, supra*, relied upon Justice Brennan's dissent in *Michael H v Gerald D,* 491 US 110, 142–43 (1989), which provided that if a father has established a "substantial" relationship with his child, then he has a protected liberty interest. In *CAW (On Remand)*, the Court of Appeals noted that in *McHone v Sosnowski*, 239 Mich App 674 (2000), it refused to apply *Hauser*, *supra*, even where evidence of a relationship between the putative father and the child existed because *Hauser's* discussion of a putative father's liberty interest was dictum. Therefore, the Court of Appeals in *CAW* held that "*McHone* precludes a finding that plaintiff has a protected liberty interest in his relationship with CAW." The Court went a step further and indicated that even if *Hauser, supra*, were followed, Heier could not show that he was denied his right to due process because the record does not support a finding that there was a substantial parent-child relationship.* ___ Mich at ___.

*For more information on *Girard, Hauser, Michael H., and McHone*, see Sections 3.2 and 3.8(B)-(C).

November 2003

Update: Criminal Procedure Monograph 2—Issuance of Search Warrants (Revised Edition)

Part A — Commentary

2.2 Initiating the Search Warrant Process

D. Authority to Issue Search Warrants

1. District Court Magistrates

Insert the following language on page 4 immediately before subsection 2:

Effective October 17, 2003, 2003 PA 185 authorizes "[a] judge *or a district court magistrate* [to] issue a written search warrant in person or by any electronic or electromagnetic means of communication, *including by facsimile or over a computer network*." MCL 780.651(3) (emphasis added).

2.15 Issuance of Search Warrant in OUIL Cases

At the top of page 31, delete the first paragraph and the **Note** immediately following it. Effective October 17, 2003, 2003 PA 185 eliminated MCL 780.651(3)'s former reference to the electronic transmission of a court order issued as a search warrant under MCL 257.625a. MCL 780.651(3), as amended, states:

> "A judge or district court magistrate may issue a written search warrant in person or by any electronic or electromagnetic means of communication, including by facsimile or over a computer network."

2.16 Submission of Affidavit and Issuance of Search Warrant by Electronic Device

Replace all but the last paragraph in Section 2.16 on pages 32 and 33 with the following:

Effective October 17, 2003, 2003 PA 185 expanded the electronic or electromagnetic means by which affidavits and search warrants could be signed and transmitted to include transmission by facsimile and over a computer network. MCL 780.651(2) provides:

> "An affidavit for a search warrant may be made by any electronic or electromagnetic means of communication, including by facsimile or over a computer network, if both of the following occur:
>
> > "(a) The judge or district court magistrate orally administers the oath or affirmation to an applicant for a search warrant who submits an affidavit under this subsection.
> >
> > "(b) The affiant signs the affidavit. Proof that the affiant has signed the affidavit may consist of an electronically or electromagnetically transmitted facsimile of the signed affidavit or an electronic signature on an affidavit transmitted over a computer network."

An oath or affirmation orally administered by electronic or electromagnetic means is considered to be administered before the judge or district court magistrate. MCL 780.651(5).

In addition to issuing search warrants in person, MCL 780.651(3) authorizes a judge or district court magistrate to issue a written search warrant by any electronic or electromagnetic means including transmission by facsimile or over a computer network.

Whenever search warrants are electronically or electromagnetically issued, the peace officer or department in receipt of the warrant must receive proof that the issuing judge or district court magistrate signed the warrant before its execution. MCL 780.651(4). An electronically or electromagnetically transmitted facsimile of the signed warrant or an electronic signature on a warrant transmitted over a computer network may serve as proof of the judge's or magistrate's signature. *Id*.

If electronic or electromagnetic means are used to submit an affidavit for a search warrant or to issue a search warrant, the transmitted copies of the affidavit or search warrant are duplicate originals and need not contain an impression made by an impression seal. MCL 780.651(6).

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Update: Criminal Procedure Monograph 5—Preliminary Examinations (Revised Edition)

Part A—Commentary

5.6 Defendant's Right to a Preliminary Examination

B. Right to Preliminary Examination on New Charges Added Following Arraignment in Circuit Court

Add the following case summary to subsection B on page 9:

In the absence of unfair surprise or prejudice, a defendant has no right to a preliminary examination on a new charge added on the prosecutor's motion to an information filed after the defendant waived preliminary examination on the original offense. MCR 6.112(H); *People v McGee*, ___ Mich App ___, ___ (2003).

An accused has a statutory right to a preliminary examination when the prosecution is initiated by filing an information, and a prosecutor is authorized to file an information once the magistrate binds a defendant over to circuit court following a preliminary examination or once the defendant has waived preliminary examination on the offense. *McGee*, *supra* at ___; MCL 766.1; MCL 767.42(1). Once the information is filed, the circuit court has jurisdiction over the defendant and the case, and the court may amend the information at any time "unless the proposed amendment would unfairly surprise or prejudice the defendant." MCR 6.112(H); *McGee*, *supra* at ___.

In *McGee*, the Michigan Court of Appeals concluded that the prosecution's motion to amend the information on the first day of the defendant's trial supported the defendant's claim of surprise, but the defendant failed to show that she suffered any actual prejudice as a result. *McGee*, *supra* at ___. In the absence of any *unfair* surprise or prejudice, the trial court did not abuse its discretion in permitting the amendment of the information to add the charge for which the defendant was ultimately convicted. *Id*. at ___.

5.17 Waivers of Preliminary Examinations

E. Amending the Information to Add New Offense After Waiver of Preliminary Examination

Add a new subsection E on page 26, and insert the following case summary:

When a defendant waives the right to a preliminary examination and the magistrate files the return, the prosecutor has authority to file an information against the defendant. Once the information is filed, the circuit court has jurisdiction over the defendant and the case, and the court may amend the information at any time "unless the proposed amendment would unfairly surprise or prejudice the defendant." MCR 6.112(H); *People v McGee*, ___ Mich App ___, ___ (2003).

The Michigan Court of Appeals concluded that the prosecution's motion to amend the information on the first day of the defendant's trial supported the defendant's claim of surprise, but the defendant failed to show that she suffered any actual prejudice as a result. *Id*. at ___. In the absence of any *unfair* surprise or prejudice, the trial court did not abuse its discretion in permitting the amendment of the information to add the charge for which the defendant was ultimately convicted. *Id*. at ___.

November 2003

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

6.11 Notice and Pleading Requirements for Asserting an Alibi Defense

Insert the following case summary at the bottom of page 12:

A trial court properly excluded testimony from a defense witness who would have testified that the defendant was not present at the time a codefendant expressed his intention to rob the victims. *People v Bell*, ___ Mich App ___, ___ (2003). Exclusion of the witness' testimony was proper because the defendant failed to satisfy the requirements of the alibi notice statute. *Id*. at ___. The defendant argued that the notice provision in the statute was inapplicable because the proposed witness was not an alibi witness since the witness' testimony did not concern the defendant's whereabouts at the time the armed robbery was committed. *Id*. at ___. The Court of Appeals affirmed the trial court's ruling that the defense witness was indeed an alibi witness whose testimony was intended to provide the defendant with an alibi for the charge of *conspiracy* to commit armed robbery. *Id*. at ___.

6.19 Motion to Suppress Confession for Violation of Sixth Amendment Right to Counsel

Insert the following case summary on page 38 immediately before the last full paragraph:

Where police officers initiated contact with the defendant regarding a polygraph examination after the defendant was arraigned and appointed counsel and while the defendant remained in custody, the defendant's statements were obtained in violation of his Sixth Amendment right to counsel and should have been suppressed. *People v Harrington*, ___ Mich App ___, ___ (2003). The Court concluded that the trial court improperly admitted the defendant's inculpatory statements because "[w]hen a defendant invokes the Sixth Amendment right to counsel, any subsequent waiver of this right in a *police-initiated custodial interview* is ineffective with respect to the charges filed against the defendant." *Id*. at ___ (emphasis in original). The Court found the police officers' conduct similar to the unconstitutional conduct of officers in *People v Anderson (After Remand)*, 446 Mich 392 (1994).

6.20 Motion for Substitution of Counsel for Defendant or Motion to Withdraw as Counsel for Defendant

Insert the following language on page 40 immediately before Section 6.21:

By an order entered on October 2, 2003, the Michigan Supreme Court vacated the Court of Appeals opinion discussed in the July 2003 update. *People v Fett*, ___ Mich ___ (2003). The Supreme Court explained, "Defendant cites to no authority, nor is this Court aware of any authority, holding that, under the facts of this case, the right to the effective assistance of counsel is violated where a defendant is represented by her attorney of choice, but is denied a *second* attorney of choice." *Id*. According to the Court, the trial court did not abuse its discretion in denying the defendant's motion for additional counsel, and the Court of Appeals erred in vacating the defendant's conviction on that basis. *Id*. The Supreme Court remanded the case to the Court of Appeals for consideration of the defendant's remaining claims. *Id*.

November 2003

Update: Criminal Procedure Monograph 7—Probation Revocation (Revised Edition)

7.38 Advice of Right to Appeal or File Application for Leave to Appeal

Insert the following text immediately following the quoted text at the top of page 36:

A defendant may not appeal by right a court's judgment after a contested probation revocation hearing if the defendant pleaded no contest to the offense for which he was sentenced to probation. *People v Perks (On Remand)*, ___ Mich App ___, ___ (2003).

The Michigan Court of Appeals concluded that MCR 6.445(H) inaccurately suggests that a probationer has an appeal of right from a court's judgment following a contested revocation hearing. *Id*. at ___.

The Court of Appeals reviewed the climate in which the Supreme Court amended MCR 6.445(H) and concluded that the rule improperly expands the Court of Appeals' jurisdiction, which is defined by law and may only be modified "as provided by law" pursuant to the constitution. *Perks*, *supra* at ___. The Court of Appeals also discussed Proposal B, the amendment to Michigan's constitution in which voters agreed that a criminal defendant's opportunity to appeal judgments based on pleas of guilty or nolo contendere should be by leave rather than by right. *Id*. at ___. According to the *Perks* Court:

> "[A] probationer does not have a right to appeal under MCL 600.308(2)(d) and 770.3(1)(d) if he or she previously entered a plea to the underlying offense because the judgment of sentence entered following a probation revocation is based upon his or her plea to the underlying conviction. Therefore, MCR 6.445(H) should require a trial court to advise the probationer that he or she has a right to appeal if the underlying conviction occurred as the result of a trial or that he or she has a right to file an application for leave to appeal if the underlying conviction was the result of a plea of guilty or nolo contendere." *Id*. at ___.

November 2003

Update: Sexual Assault Benchbook

CHAPTER 4

Defenses To Sexual Assault Crimes

4.5 Alibi

G. Sanction of Exclusion For Failure to File Required Notice

Insert the following text after the "Note" on page 215, immediately before subsection (H):

A trial court properly excluded testimony from a defense witness who would have testified that the defendant was not present at the time a codefendant expressed his intention to rob the victims. *People v Bell*, ___ Mich App ___, ___ (2003). Exclusion of the witness' testimony was proper because the defendant failed to satisfy the requirements of the alibi notice statute. ___ Mich App at ___. The defendant argued that the notice provision in the statute was inapplicable because the proposed witness was not an alibi witness since the witness' testimony did not concern the defendant's whereabouts at the time the armed robbery was committed. ___ Mich App at ___. The Court of Appeals affirmed the trial court's ruling that the defense witness was indeed an alibi witness whose testimony was intended to provide the defendant with an alibi for the charge of *conspiracy* to commit armed robbery. ___ Mich App at ___.

November 2003

Update: Traffic Benchbook—Revised Edition, Volume 1

CHAPTER 2

Civil Infractions

2.4 Parking, Stopping, or Standing

E. Unattended Vehicle

On page 2-13, replace the language in subsection E with the following:

"A person shall not allow a motor vehicle to stand on a highway unattended without engaging the parking brake or placing the vehicle in park and stopping the motor of the vehicle. If the vehicle is standing upon a grade, the front wheels of the vehicle shall be turned to the curb or side of the highway." MCL 257.676(1).*

*Effective October 17, 2003, 2003 PA 184.

2.8 Speed Violations

H. Evidence in a Speed Case

2. Speed measuring devices

Insert the following case summary near the top of page 2-34 immediately before the bulleted information concerning "Visual Average Speed Computer and Recorder":

The requirement that a speedmeter be serviced *as recommended* "does not preclude the possibility that *no* service may be recommended." *People v Strawcutter*, ___ Mich App ___, ___ (2003). The defendant in *Strawcutter* argued that evidence obtained from the radar speedmeter used to cite him for speeding was improperly admitted because the speedmeter had not been serviced for approximately 13 months, and the police officer was unaware of any servicing guidelines recommended by the speedmeter's manufacturer. *Id*. at ___. On appeal, the circuit court found that the officer's lack of knowledge about the manufacturer's service requirements constituted a failure to comply with the requirements of *People v Ferency*. *Id*. at ___. The Michigan Court of Appeals disagreed and affirmed the district court's finding that the defendant was responsible for a speeding violation. *Id*. at ___. According to the *Strawcutter* Court, "[the police officer] complied with the relevant servicing requirements under *Ferency*: no servicing was recommended and no servicing was performed." *Id*. at ___.

November 2003

Update: Traffic Benchbook—Revised Edition, Volume 2

CHAPTER 2

Procedures in Drunk Driving and DWLS Cases

2.4 Search Warrants for Chemical Testing

A. Issuance of a Search Warrant — Substance and Procedures

4. Issuance of a Search Warrant by Electronic or Electromagnetic Devices

Replace the content of subsection 4 on page 2-23 with the following:

Effective October 17, 2003, 2003 PA 185 expanded the "electronic or electromagnetic means" by which an affidavit for a search warrant could be made and by which a search warrant could be issued to include "facsimile or over a computer network."

MCL 780.651(2), as amended, provides:

> "An affidavit for a search warrant may be made by any electronic or electromagnetic means of communication, including by facsimile or over a computer network, if both of the following occur:
>
> > "(a) The judge or district court magistrate orally administers the oath or affirmation to an applicant for a search warrant who submits an affidavit under this subsection.
> >
> > "(b) The affiant signs the affidavit. Proof that the affiant has signed the affidavit may consist of an electronically or electromagnetically transmitted facsimile of the signed affidavit or an electronic signature on an affidavit transmitted over a computer network."

2003 PA 185 eliminated MCL 780.651(3)'s former provision regarding electronic transmission of a court order issued as a search warrant under MCL 257.625a. Effective October 17, 2003, MCL 780.651(3) states:

> "A judge or district court magistrate may issue a written search warrant in person or by any electronic or electromagnetic means of communication, including by facsimile or over a computer network."

The remaining provisions of MCL 780.651, as amended by 2003 PA 185, that are relevant to the use of electronic or electromagnetic devices in the issuance of search warrants provide:

> "(4) The peace officer or department receiving an electronically or electromagnetically issued search warrant shall receive proof that the issuing judge or district court magistrate has signed the warrant before the warrant is executed. Proof that the issuing judge or district court magistrate has signed the warrant may consist of an electronically transmitted facsimile of the signed warrant or an electronic signature on a warrant transmitted over a computer network.
>
> "(5) If an oath or affirmation is orally administered by electronic or electromagnetic means of communication under this section, the oath or affirmation is considered to be administered before the judge or district court magistrate.
>
> "(6) If an affidavit for a search warrant is submitted by electronic or electromagnetic means of communication, or a search warrant is issued by electronic or electromagnetic means of communication, the transmitted copies of the affidavit or search warrant are duplicate originals of the affidavit or search warrant and are not required to contain an impression made by an impression seal."